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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1741

ALPHONSE PERSICO AND JERRY LANGELLA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 491 F. 2d 1156.

JURISDICTION

The judgment of the court of appeals with respect to petitioner Persico was entered on February 19, 1974. With respect to petitioner Langella, the court of appeals has as yet rendered no judgment. The petition for a writ of certiorari was filed on May 20, 1974. Petitioner Persico invokes the jurisdiction of this Court under 28 U.S.C. 1254(1). Petitioner Langella, in petitioning for a writ of certiorari prior to judgment in the court of appeals, invokes the jurisdiction

of this Court pursuant to 28 U.S.C. 1254(1) and 2101 (e).

QUESTIONS PRESENTED

1. Whether a grand jury witness whose telephone conversations have been intercepted pursuant to court orders is entitled to litigate the validity of such interceptions in civil contempt proceedings brought after the witness has refused to answer questions based upon information acquired from the interceptions.

2. Whether the provisions of Rule 42(b), Fed. R. Crim. P., are applicable to civil contempt proceedings under 28 U.S.C. 1826.

3. Whether, in the circumstances of this case, the contumacious witness was misled as to the scope of immunity conferred upon him by 18 U.S.C. 6002.

STATEMENT

1. On January 23, 1974, in the United States District Court for the Eastern District of New York, petitioner Persico was found to be in civil contempt, pursuant to 28 U.S.C. 1826(a), for refusing to answer a question before a grand jury. He was committed to custody for 60 days, or until such earlier time as he purged himself of the contempt.[1] The court of appeals affirmed (Pet. App. 1a–14a).

On April 17, 1974, petitioner Langella was likewise found to be in civil contempt pursuant to 28 U.S.C. 1826(a) for refusing to answer a question before a grand jury. He was committed to custody for the du-

[1] Petitioner Persico has served the 60 days without purging the contempt and is no longer incarcerated.

ration of the life of the grand jury or until such earlier time as he purged himself of the contempt. The case, however, has not yet been heard or decided by the court of appeals,[2] and the petition is premature.

Rule 20 of the Rules of this Court provides that "[a] writ of certiorari to review a case pending in a court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this Court." That test is not met here, and Langella's only justification for seeking to bypass the court of appeals is the insufficient contention that his arguments are foreclosed by that court's decision in the case involving petitioner Persico.[3] Believing that Langella's petition should be denied as premature, we do not address the specific circumstances of his contempt conviction.

2. On January 23, 1974, petitioner Persico was summoned before a special grand jury in the Eastern District of New York investigating "racketeering influence in legitimate business." Petitioner, invoking his Fifth Amendment privilege, refused to answer questions. He was thereafter granted "use" immunity

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[2] On April 26, 1974, petitioner Langella filed a notice of appeal and on May 13, the record was transmitted to the court of appeals; however, Langella has not filed a brief in that court.

[3] The panel that affirmed Persico's conviction included only one active circuit judge, and Langella's chances of obtaining a different ruling from a different panel are not insignificant, particularly in light of a subsequent somewhat contrary ruling by another court of appeals (see p. 14, *infra*, n. 11).

pursuant to 18 U.S.C. 6002 and 6003. When subsequently brought before the grand jury and ordered to answer, he refused to answer questions concerning his employment, claiming that the questioning derived from unlawful electronic interception of his conversations (Pet. App. 3a; H. 12–15).[4] Petitioner was thereupon brought before the district court where he objected that the intended questioning of him would be based upon information derived from electronic surveillance conducted at his home in 1973. The government conceded that questions concerning petitioner's employment had been based in part upon the results of electronic surveillance. The district court regarded petitioner's objection as premature, however, since the only question that had been asked at that point was whether he was employed. Petitioner then reappeared before the grand jury where he answered certain questions regarding lawful employment but again refused to answer about any other employment (G.J. 5–8).[5]

Petitioner was again brought before the district court and renewed his objection to the questioning as being derived from unlawful electronic surveillance. The government, having conceded that the questioning was derived from electronic surveillance, maintained that, because the surveillance was lawfully conducted pursuant to three court orders, petitioner

[4] "H." refers to the transcript of proceedings in the district court on January 23, 1974, a copy of which we are lodging with the Clerk.

[5] "G.J." refers to the transcript of grand jury proceedings on January 23, 1974, a copy of which we are lodging with the Clerk, under seal.

had no ground for objection.[6] The district court examined the orders and supporting papers *in camera* and found them to be valid (H. 36–39).[7] The court denied petitioner's request to test the legality of the surveillance by a motion to suppress and again ordered him to testify (Pet. App. 3a).

Petitioner returned to the grand jury and there answered questions concerning his involvement in other enterprises, including an illegal gambling business. He once again became recalcitrant, however, when asked to identify the individuals who worked for him in that unlawful enterprise (Pet. App. 3a–4a). He based the refusal to answer on the alleged illegality of the electronic surveillance. Petitioner was

[6] The first order, dated March 21, 1973, permitted interception over petitioner's residence telephone for fifteen days. An order of April 9, 1973, extended the surveillance for a further period of fifteen days. On May 8, 1973, another order, also directed at petitioner's residence telephone, was issued. In August 1973, petitioner was notified of these interceptions. Thereafter, petitioner promptly commenced an action pursuant to 18 U.S.C. 2518(8)(d) for disclosure of the wire interception applications and orders. Petitioner also sought to have the applications inspected *in camera* to determine whether the probable cause requirements of Section 2518(3)(a), (b) and (d) had been met. The government opposed disclosure on the ground that it would effectively halt an ongoing investigation. On August 20, 1973, the district court denied the motion as premature, concluding that the interests of justice would be "better served by delaying disclosure until after indictment, or after abandonment of the investigation." *In re Persico*, No. 73 C 1213, decided August 20, 1973 (E.D. N.Y.). We are lodging a copy of the district court's Memorandum and Order with the Clerk.

[7] Petitioner's counsel sought disclosure of the orders and affidavits so that a motion to suppress could knowledgeably be made. The government opposed disclosure, particularly because information reflected in the affidavits related to an ongoing investigation (H. 30–31, 36–39, 41).

thereupon held in contempt and committed to custody for 60 days or until such earlier time as he agreed to answer the question. Petitioner then renewed his motion to suppress and to inspect the wiretap orders and supporting affidavits. The motion was denied (Pet. App. 4a–5a).

ARGUMENT

1. At the outset, we advert to the possible mootness of the case. Petitioner has been unconditionally released from the 60-day commitment imposed by the contempt order. Moreover, it has not been suggested that the adjudication of civil contempt entails any further "disabilities or burdens" under either federal or state law. Compare *Ginsberg* v. *New York*, 390 U.S. 629, 633–634, n. 2; *Carafas* v. *La Vallee*, 391 U.S. 234, 237–238. Nor can such "collateral consequences" reasonably be presumed here. Compare *Sibron* v. *New York*, 392 U.S. 40, 53–58. Accordingly, this case may be governed by *St. Pierre* v. *United States*, 319 U.S. 41.

To be sure, here, unlike *St. Pierre*, petitioner did make timely application to this Court for bail, expressly representing that the case would become moot if his sentence expired (see Pet. 7). It is questionable, however, whether those applications were effective to defeat mootness. We note initially that petitioner had not, before applying to this Court, sought bail from the court of appeals after its affirmance of the contempt order. He argued that, in the circumstances, that would have been a futile gesture because that court had denied him bail pending appeal, having in-

stead accelerated the hearing (see Pet. 7). But this Court may not have accepted that excuse and may have grounded its denial of bail on petitioner's failure to exhaust his remedies below. If so, petitioner may not have effectively brought himself within the exception to the *St. Pierre* rule by doing everything in his power to preserve his case for review here. Compare *Sibron* v. *New York, supra,* 392 U.S. at 51–53.

A more fundamental question is whether an application for bail or for a stay preserves a case against mootness when it is denied. We assume this Court has power to moot a case by denying the relief that would preserve it, and that when that happens the matter is at an end. We do not read *Sibron* as overruling that doctrine. Indeed, the Court has seemingly indicated the contrary in *Noyd* v. *Bond,* 395 U.S. 683, 688–693. There, in an elaborate discussion, the rejection of the government's suggestion of mootness is apparently grounded solely on the effectiveness of a stay of a military sentence granted by Mr. Justice Douglas for the apparent purpose of defeating mootness.

Finally, we deem it incumbent on us to advise the Court that it is the government's present intention to recall petitioner before the grand jury if certiorari is denied. Thus, the issue may well recur. How this affects the question of mootness is not clear. One might well argue that it places the case into the category of continuing disputes which the Court has held are not moot even when the order sought to be reviewed has expired. *E.g., Carroll* v. *President and Commissioners of Princess Anne,* 393 U.S. 175, 178–179. On the other hand, in circumstances identical to

ours, *St. Pierre* expressly ruled otherwise. There, the Court deemed the government's intention to recall the witness before the grand jury a factor supporting the ruling of mootness. 319 U.S. at 43.

2. Petitioner's primary contention is that 18 U.S.C. 2515 provides a grand jury witness with a defense in contempt proceedings under 28 U.S.C. 1826(a), where it is alleged that the question before the grand jury derived from information acquired from unlawful electronic surveillance, even though the allegedly unlawful interceptions were conducted pursuant to court orders. In a thorough opinion, upon which we rely in the main, the court of appeals rejected this contention (Pet. App. 1a–14a).

In *Gelbard* v. *United States*, 408 U.S. 41, this Court held that Section 2515 provides such a defense where the interception was not conducted pursuant to court order. The Court left undecided, however, the question presented in this case: whether witnesses "may refuse to answer questions if the interceptions of their conversations were pursuant to court order." 408 U.S. at 61, n. 22. Moreover, Mr. Justice White, concurring, explicitly suggested the result reached here (*id.* at 70):

> Where the Government produces a court order for the interception, however, and the witness nevertheless demands a full-blown suppression hearing to determine the legality of the order, there may be room for striking a different accommodation between the due functioning of the grand jury system and the federal wiretap statute. Suppression hearings in these circumstances would result in protracted interruption of grand jury proceedings. At the

> same time, prosecutors and other officers who have been granted and relied on a court order for the interception would be subject to no liability under the statute, whether the order is valid or not; and, in any event, the deterrent value of excluding the evidence will be marginal at best.[8]

We submit that these considerations, endorsed by the Court in *United States* v. *Calandra*, 414 U.S. 338, should govern here.

For a fuller elaboration of the controlling principles, we invoke the following passage from the opinion of the court below (Pet. App. 9a–12a):

> Congressional concern over disruption of smooth and efficient operation of the grand jury system is found in the legislative history of Chapter 119, also. Senate Report No. 1097, printed in 1968 U.S. Code Cong. & Admin. News p. 2112, appears to controvert Persico's contention that in defending the contempt proceedings resulting from his refusal to answer a question before the grand jury he is entitled to a suppression hearing. Though the legislative history recognizes that illegally obtained

[8] In light of the express reservation of the issue in both the majority opinion and the concurring opinion of Mr. Justice White, petitioner's contention that *Gelbard* resolves the question in untenable. It is true that as to two of the four witnesses covered by the *Gelbard* opinion (Gelbard and Parnas) the government had disclosed the existence of court orders for the wiretaps. But, presumably because the other case (Egan and Walsh) involved electronic eavesdropping not authorized by any court order, the decision addresses that situation. Recognition of the court orders supporting the intercepting as to Gelbard and Parnas is, however, implicit in the marginal note leaving resolution of the issue in these circumstances to the district court on remand. 408 U.S. at 61, n.22.

wiretap evidence, or the fruits thereof, must be excluded from any proceedings before a grand jury, the history further discloses that the exclusionary rule "must, of course, be read in light of section 2518(10)(a) discussed below, which defines the class entitled to make a motion to suppress." Senate Report No. 1097, *supra*, U.S. Code Cong. & Admin. News 1968, at p. 2185. Most crucial to our task, therefore, is the congressional understanding of the effect of § 2518(10)(a) on the grand jury process:

> "Paragraph (10)(a) provides that any aggrieved persons, as defined in section 2510(11), discussed above, in any trial hearing or other proceeding in or before any court department, officer, agency, regulating body or other authority of the United States, a State, or a political subdivision of a State may make a motion to suppress the contents of any intercepted wire or oral communication or evidence derived therefrom. This provision must be read in connection with sections 2515 and 2517, discussed above, which it limits. It provides the remedy for the right created by section 2515. *Because no person is a party as such to a grand jury proceeding, the provision does envision the making of a motion to suppress in the context of such a proceeding itself.* Normally, there is no limitation on the character of evidence that may be presented to a grand jury, which is enforcible by an individual (*Blue* v. *United States* [*United States* v. *Blue*], 86 S. Ct. 1416, 384 U.S. 251 [16 L. Ed. 2d 510] (1965).) There is no intent to change this general rule. It is the intent

> of the provision only that when a motion to suppress is granted *in another context*, its scope may include use in a *future* grand jury proceeding . . ." Senate Report No. 1097, *supra*, U.S. Code Cong. & Admin. News 1968, at p. 2195. (Emphasis supplied).

As noted, though Congress prescribed that illegal wiretap evidence must be excluded from all grand jury proceedings, hearings to suppress evidence were not to be permitted during such proceedings. These seemingly inconsistent policy determinations can be reconciled only by interpreting the statute as requiring exclusion only when it is clear that a suppression hearing is unnecessary, as when the Government concedes that the electronic surveillance was unlawful or when the invalidity of the surveillance is patent, such as, for example, when no prior court order was obtained, or when the unlawfulness of the Government's surveillance has been established in a prior judicial proceeding. In these situations both statutory policies—the exclusion of illegally acquired evidence and the maintenance of unimpeded grand jury proceedings—are served. But where illegality is claimed and, if established, can be established only by way of a plenary suppression hearing, one important aim of the legislation would be frustrated.

Appellant, however, referring also to the language of the legislative history quoted above, would have us find that the contempt proceeding here is a proceeding in "another context" and therefore the general proscription against hearings upon motions to suppress in grand jury proceedings does not prevent motions to

suppress and hearings thereon in contempt proceedings arising out of a witness's refusal to answer a grand jury's question. While appellant's argument is a superficially plausible one, his reasoning in support of the argument is unrealistic. The contempt mechanism employed here to coerce testimony is so intimately connected with the grand jury proceedings in which the testimony is desired as to be really a part of those proceedings. Obviously, any expansion of the breadth of inquiry permissible in a contemporaneous contempt proceedings initiated because of the recalcitrance of a grand jury witness necessarily inhibits the smooth functioning and efficient operation of that grand jury.

Moreover, Congress could not have intended that a *contemporaneous* civil contempt proceeding such as the one involved here—a proceeding whose only purpose is to invite a recalcitrant witness to cooperate with the grand jury—is a proceeding "in another context" rather than in the context of the grand jury's proceedings. That the congressional intent was so limited is demonstrated by the language of the Senate Report that the scope of a suppression order granted "in another context" may extend to a "future grand jury proceeding," that is, may extend only to a grand jury proceeding which clearly postdates the proceeding "in another context." Therefore the term "another context" could not have been intended to include a hearing on a contempt citation contemporaneous with the grand jury proceeding.

We hold that in contempt proceedings initiated when a witness who has been granted

"derivative use" immunity refuses to answer questions propounded by a grand jury because he claims he is entitled to a hearing to ascertain whether the questions posed are the product of unlawful electronic surveillance the witness is not entitled to a plenary suppression hearing to test the legality of that surveillance. We hold that the refusal would be permissible only if there is an absence of a necessary court order or if there is a concession from the Government that the surveillance was not in conformity with statutory requirements or if there is a *prior* judicial adjudication that the surveillance was unlawful. Here there were three court orders. Inasmuch as Judge Judd conducted an in camera inspection to ascertain whether they complied with the statute and found that they did comply, Persico received all that he was entitled to receive. He therefore has no basis for complaint that his motions for suppression hearings were denied.[9]

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[9] We depart from the opinion of the court of appeals to the extent that it may imply that petitioner was entitled to receive what he did in fact receive, *i.e.*, the district court's *in camera* examination of the wiretap orders and applications to determine whether the statute had been complied with in all respects. In our view, all that is required, once a witness claims that questioning derives from unlawful electronic surveillance, is that the government, if there has been an overhearing, acknowledge that fact and produce a court order (*in camera* if open disclosure would compromise the investigation), and concede illegality when it is patent. Under 18 U.S.C. 3504(a)(1), upon the claim of a party, the government is required to "affirm or deny the occurrence of the alleged unlawful act * * *." See *Gelbard* v. *United States*, *supra*, 408 U.S. at 52–55, where this Court rejected the government's contention that Section 3504(a)(1) applied only to those illegal interceptions that occurred prior to June 19, 1968, the

Notwithstanding our submission that the decision below is basically correct, we recognize that the issue is potentially one for resolution by this Court. There is, moreover, a limited conflict between the ruling here and the First Circuit's decision in *In re Lochiatto*, 497 F. 2d 803.[10] Nevertheless, because only two courts of appeals have so far considered the question in this area of developing law, we suggest that it would be appropriate for this Court to defer review of the issue until the courts of appeals have been able more fully

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effective date of the federal wiretap statute. When it is established that a district judge has authorized the interception, it would seem unnecessary to submit the same materials to a second judge to confirm the initial determination of probable cause. Where a court order is produced, it is subject to a strong presumption of validity, given the stringent procedures of 18 U.S.C. 2510, *et seq.*, and, particularly, the prior authorization by a district court which, in the vast majority of cases, will assure full compliance with the statute.

[10] The First Circuit there concluded that, although 18 U.S.C. 2518(10)(a) does not give a grand jury witness standing to move for suppression, Section 2515 permits the witness to assert, as a defense in contempt proceedings, the grounds for suppression enumerated in Section 2518(10)(a) (i), (ii) and (iii). See *In re Marcus*, 491 F. 2d 901 (C.A. 1). The court further held, however, that a plenary evidentiary hearing with full disclosure was not necessarily required. Specifically, the court ruled that, at least where the government does not object to disclosure as constituting a breach of secrecy, the witness-defendant should be afforded an opportunity to examine the application, order, affidavits in support thereof, and a government affidavit submitted to indicate the time period of the surveillance. But, where the government interposes an objection on secrecy grounds and sensitive information cannot effectively be deleted from the materials, the district court must review the materials *in camera* to determine the constitutional and statutory validity of the interception. In that case, the government chose to comply with the ruling and did not seek review in this Court.

to treat it. The same considerations that led the Court to postpone decision of the question in *Gelbard* (despite the government's disclosure that two of the interceptions there were authorized by court orders) may still be controlling.

3. Petitioner also contends that the procedures embodied in Rule 42(b), Fed.R.Crim.P., dealing exclusively with criminal contempt, should have been followed here. The claim is not well taken. Cf. *Stewart* v. *United States,* 440 F. 2d 954, 957 (C.A. 9), affirmed *sub nom. Kastigar* v. *United States,* 406 U.S. 441. Where a witness, "without just cause," refuses "to comply with an order of the court to testify," 28 U.S.C. 1826(a) expressly provides for summary confinement. A contempt proceeding under 28 U.S.C. 1826 is civil in nature, because its purpose is remedial and coercive. *Shillitani* v. *United States,* 384 U.S. 364. In *Shillitani,* this Court observed that contempt proceedings must be viewed as remedial and therefore civil in nature, where, as here, "the court conditions release upon the contemnor's willingness to testify." *Id.* at 370. Accordingly, the procedural requirements of Rule 42(b) for criminal contempt have no application here.[11]

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[11] This case does not present the question before the Court in *United States* v. *Wilson,* No. 73-1162, certiorari granted May 13, 1974. In *Wilson,* the government is urging that summary criminal contempt proceedings under Rule 42(a) should be available when a witness, in disobedience of a court order, refuses to testify at trial after receiving a grant of immunity. The government is also urging that insofar as *Harris* v. *United States,* 382 U.S. 162, dictates the applicability of Rule 42(b) under such circumstances, that decision should be over-

4. Petitioner's final contention is that he was improperly held in contempt for refusing to testify because the government's explanation to him of the scope of immunity conferred by 18 U.S.C. 6002 was inadequate. The court of appeals, although observing that the prosecutor's "explanation of the 'use' and 'derivative use' immunity conferred on Persico under 18 U.S.C. § 6002 was not the epitome of either precision or lucidity," rejected this claim (Pet. App. 13a–14a). Petitioner was told that nothing he said could be used against him in *any* proceeding and that only if the government developed evidence independent of his testimony could he be prosecuted concerning any matters about which he testified (G.J. 3, 5). The court of appeals properly concluded that petitioner was "probably sufficiently apprised * * * of the extent of the immunity he had been granted" and that, in any event, it was extremely unlikely that he

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ruled. The critical distinction here, however, is that, unlike *Harris* and *Wilson*, the district court chose to treat the contempt civilly.

Petitioner points to the decision in *United States* v. *Alter*, 482 F. 2d 1016 (C.A. 9), in maintaining that there is a conflict between the Ninth and Second Circuits on this question. In *Alter*, a Ninth Circuit panel concluded that the provisions of Rule 42(b) are applicable to a contempt proceeding under 28 U.S.C. 1826. But see *Stewart* v. *United States*, *supra*. This holding is plainly at odds with the express language of Section 1826, which provides that such a contemptuous witness may be "summarily" confined. Of course, any contempts treated under this statute are civil—that is, remedial and coercive in nature—since the statute provides that confinement terminates once the witness is willing to give testimony. We again suggest that consideration of the issue by this Court would be more appropriate once the question has been more fully dealt with by the courts of appeals.

had been misled, "inasmuch as his experienced and competent counsel must have been fully aware of the extent of § 6002 immunity" (Pet. App. 13a–14a), and it is reasonable to assume that this understanding was communicated to petitioner.[12]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.
HENRY E. PETERSEN,
Assistant Attorney General.
SHIRLEY BACCUS-LOBEL,
Attorney.

SEPTEMBER 1974.

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[12] Notwithstanding any shortcomings in the prosecutor's explanation of the immunity provision to petitioner, it was "clearly made applicable to him * * *" (*Stevens* v. *Marks*, 383 U.S. 234, 244), and it was fairly demonstrated to him that an immunity, as broad in scope as the privilege it replaces, is available and applicable to him." *Id.* at 246. Petitioner's reliance upon *Stevens* is thus misplaced.

U.S. GOVERNMENT PRINTING OFFICE: 1974